



Democratic Policy Committee
United States Senate
Washington, D.C. 20510-7050
Byron Dorgan, Chairman

DEMOCRATIC POLICY COMMITTEE

June 28, 2000
Publication: SR-60-Health

SPECIAL
REPORT

Rhetoric vs. Reality: Republicans and Democrats on *a Patients' Bill of Rights*

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Rhetoric vs. Reality: Republicans and Democrats on a *Patients' Bill of Rights*

Recent polls and focus groups have suggested to Republicans that a *Patients' Bill of Rights* — long championed by Democrats — is a top priority for the American people. In response, Republicans have adopted a strategy that uses rhetoric to blur the lines between where Democrats and Republicans stand on passage of a meaningful *Patients' Bill of Rights*.

Democrats know there are few gray areas when it comes to the positions of Democrats and Republicans on comprehensive and enforceable patient protections for all Americans. Indeed, the differences are black and white: Democrats have fought for immediate passage of a real *Patients' Bill of Rights*, only to have their efforts repeatedly blocked by Republicans.

Unlike Republicans, Democrats Support a Real *Patients' Bill of Rights*

Democrats introduced a strong, enforceable *Patients' Bill of Rights* over two years ago. While the Senate failed to pass a meaningful bill, the House passed the Norwood-Dingell *Bipartisan Consensus Managed Care Improvement Act* (**H.R. 2990**) — a real *Patients' Bill of Rights* — on October 7, 1999. Since that time, no real progress has been made. The Conference Committee has worked for over six months without resolving any key issues.

Last year, during debate on patient protections, Senate Democrats supported **S. 6**, the *Patients' Bill of Rights*, which is similar to the patient protection provisions contained in the Norwood-Dingell *Bipartisan Consensus Managed Care Improvement Act*. Unlike **S. 6** and **H.R. 2990**, the bill passed by Senate Republicans (**S. 1344**) covers only one-third of privately insured Americans and provides a series of hollow, cosmetic measures that will leave insurers and HMOs in charge of medical decisions.

Senate Republican Leadership Continues to Thwart Progress

After over six months of inaction by the Conference Committee, Senate Democrats forced a floor vote on a real *Patients' Bill of Rights*. On June 15, 2000, Senate Republicans voted down the Norwood-Dingell *Bipartisan Consensus Managed Care Improvement Act*.

Here is what *The New York Times* said about that vote and the Senate Republicans' record on the *Patients' Bill of Rights*:

"The Republican Party, flooded with money from the managed-care industry, gives lip service to the idea of protecting patients, but then does the bidding of the companies that are the source of all that cash."

"What occurred on the floor of the Senate this week was a G.O.P.-sponsored charade in which one Republican senator after another

talked about protecting the health of patients while voting to protect the profits of the industry.”

—*The New York Times*, June 15, 2000

“There is no mystery here. Campaign money is dictating medical policy in the Senate. The political system, and especially the Republican Party, is awash in money from the health-care industry.”

— *The New York Times*, June 16, 2000

The Bipartisan Norwood-Dingell Bill Provides Meaningful Patient Protections

On October 7, 1999, the House adopted, by a 275-151 vote, the bipartisan Norwood-Dingell patient protection bill. Sixty-eight Republicans joined virtually all Democrats in support of the bill.

The Norwood-Dingell bill is a sensible compromise that covers every American with private insurance and provides solid, common-sense protections dealing with the most serious abuses, such as refusing to pay for emergency care even when a patient has symptoms of a heart attack or stroke; refusing seriously ill children and adults access to needed specialty care; and denying coverage of clinical trials to patients with life-threatening diseases.

The legislation provides a speedy, binding independent review of disputes between HMOs and patients, and ensures that HMOs are held accountable when a plan's decisions kill or injure patients. Importantly, the legislation protects employers from liability, unless they intervene to make a specific decision that results in injury or death. The Norwood-Dingell bill is endorsed by more than 300 groups. The Senate Republican bill, by contrast, is supported by no one but the HMOs and their allies.

The Senate Republican Bill Leaves Patients Unprotected

The Republican bill passed by the Senate excludes 113 million of the 161 million Americans with private insurance — more than two-thirds — from most of its protections. Even for the minority of Americans who are covered by the bill, protections are far from adequate. Key provisions to ensure that doctors, not HMOs, make medical decisions are omitted.

Even where the Republican bill has sections that address the same problems as the Norwood-Dingell bill, the provisions are too riddled with loopholes to actually help patients. The legislation would preserve the unparalleled immunity enjoyed by certain HMOs. The Senate GOP bill is overwhelmingly opposed by leading organizations representing patients, doctors, nurses, and other health professionals, as well as groups representing women, children, families, and people with disabilities.

The differences between the Senate Republican bill and the bipartisan Norwood-Dingell bill are described in more detail below.

Who is Covered

Bipartisan Norwood-Dingell Bill

- ✓ All 161 million privately insured Americans are covered by the Norwood-Dingell bill.

Senate Republican Bill

- ✗ The Republican bill leaves more than 100 million privately insured Americans — more than 2/3 of the total — uncovered by most of the substantive provisions of the bill.

Emergency Care

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Allows an individual who has symptoms that meet the prudent layperson standard to go to the nearest emergency room without preauthorization, and requires the insurance plan to cover the visit. No additional charges for use of a non-network facility.
- ✓ Requires payment for maintenance and post-stabilization care according to rules already adopted for Medicare.
- ✓ Permits denial to be appealed to an independent third-party reviewer.
- ✓ Supported by the American College of Emergency Physicians.

Senate Republican Bill

- ✗ Covers only individuals in self-insured plans (48 million).
- ✗ Does not grant a right of appeal to an independent third party when a plan fails to cover or pay for emergency or post-stabilization services.
- ✗ Unclear whether it even ensures coverage under a “prudent layperson” standard, because of ambiguous language.
- ✗ Section on access to post-stabilization care contains a large loophole: if the plan does not respond to an emergency department in one hour, they have to pay for services to maintain stability — but those services are defined as services in the emergency department. Therefore, if a patient is transferred to another part of the hospital for post-stabilization care, the Republican bill would not require coverage for that care.
- ✗ Opposed by the American College of Emergency Physicians.

Obstetrician/Gynecologists

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Provides direct access to Obstetrician/Gynecologists for *all* OB/GYN services.
- ✓ Supported by the National Partnership for Women and Families and the American College of Obstetricians and Gynecologists (ACOG).

Senate Republican Bill

- ✗ Covers only women in self-insured plans (less than 48 million).
- ✗ Does not require plan to allow direct access to OB/GYN, *except* for routine care. If a woman has an abnormal pap smear, she has to go through a gatekeeper to seek further treatment.
- ✗ Opposed by the National Partnership for Women and Families and the American College of Obstetricians and Gynecologists (ACOG).

Access to Specialists

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Provides the right to specialty care if specialty care is medically indicated.
- ✓ Guarantees no extra charge for the use of a non-network specialist if the HMO has no specialist in its network appropriate and available to treat the condition.
- ✓ Ensures that a specialist may act as care coordinator for patients with chronic, ongoing conditions.
- ✓ Permits decision to deny specialty care to be appealed to independent reviewer.

Senate Republican Bill

- ✗ Covers only individuals in self-insured plans (48 million).
- ✗ Provides no ability to go outside the HMO network at no extra cost if the HMO's network is inadequate.
- ✗ Allows the HMO to write contracts rendering the protection meaningless
- ✗ (e.g., specialty care is covered under the contract only when authorized by a gatekeeper). Essentially, this provision is a restatement of the status quo.
- ✗ Does not ensure that people with chronic conditions can use their specialist to coordinate their care.
- ✗ Gives no right to appeal an HMO decision to deny care by an appropriate specialist to an independent third party.

Requirement for Plans to Pay Routine Doctor and Hospital Costs of Clinical Trial

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Covers clinical trials for all serious illnesses when standard treatment is ineffective.
- ✓ Ensures that a denial of a needed clinical trial can be appealed to an independent reviewer.
- ✓ Supported by all major cancer and disease groups.

Senate Republican Bill

- ✗ Covers only individuals in self-insured plans (48 million).
- ✗ Only ten percent of patients eligible to enroll in clinical trials would receive any coverage because it covers only cancer clinical trials — leaves out patients with mental illness, spinal cord injury, Parkinson's disease, Alzheimer's disease, diabetes, and other serious conditions (only 1/3 of clinical trials are for cancer).
- ✗ Does not provide a right to appeal an HMO's denial of coverage for a needed clinical trial.
- ✗ No cancer groups supported the amendment when it was offered, and it was opposed by the American Cancer Society, National Breast Cancer Coalition, and National Alliance for Mentally Ill.

Access to Needed Drugs Not Included in Plan List (Formulary)

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Prohibits HMOs from charging more for medically necessary off-formulary medications.

Senate Republican Bill

- ✗ Covers only individuals in self-insured plans (48 million).
- ✗ Allows HMOs to financially penalize patients who need to obtain medicine off an HMO's approved list (formulary), even when it is medically necessary.

Point of Service Option

(Requires employees to be offered at least one plan that allows them to go outside an HMO's provider network to the doctor of their choice.)

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans, including those in small businesses.

Senate Republican Bill

- ✗ Covers only individuals in self-insured plans (48 million).
- ✗ Grants additional specific exclusion for small businesses with 50 or fewer workers.
- ✗ Leaves out almost all individuals who do not have a point-of-service option available, since HMOs are rarely offered under self-insured arrangements and since small businesses are those most likely not to offer employees a choice of health plans.

Continuity of Care for Patients

(When a doctor is dropped from a network or an employer changes insurance plans.)

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Provides a transition period of 90 days for all patients who are undergoing treatment for serious illnesses when the change occurs (e.g., patients having chemotherapy or radiation therapy, cardiac rehabilitation following open heart surgery, psychiatric care, diabetes management, etc.).
- ✓ Allows terminally ill patients to stay with the same doctor through the end of their lives; hospitalized patients can stay in the same hospital until discharge or hospitalization is no longer medically necessary.
- ✓ Protects pregnant women.

Senate Republican Bill

- ✗ Covers only individuals in self-insured plans (48 million).
- ✗ Leaves out protection for all Americans who are not terminally ill, pregnant, or hospitalized (e.g., patients with cancer, chronic illnesses, or any other disease who are undergoing a course of treatment).
- ✗ Provides only 90 days protection to people in hospitals, potentially forcing those with longer stays to change doctors and hospitals in the middle of an inpatient hospitalization.

External Appeals

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Ensures that a state or federal agency controls the process for choosing the appeal entity — not the insurer.
- ✓ Ensures a *de novo* review — a fresh look at the facts.
- ✓ Ensures that a reviewer's decision is based on a review of the best available medical evidence and the condition of the patient, not on the plan's definition of "medical necessity."
- ✓ Ensures that the decision of the independent reviewer is binding.
- ✓ Permits all denials of care or payment for care that involve any element of medical judgment to be appealed to an external reviewer.

Senate Republican Bill

- ✗ Leaves out 38 million Americans, those in the individual market and those receiving coverage from State and local governments.
- ✗ Allows the HMO to choose and pay the appeal entity that decides the case.
- ✗ Allows the HMO or insurer to define "medical necessity," tying the hands of the independent review entity and forcing them to follow the HMO's definition, no matter how narrow or unfair.
- ✗ Fails to provide for *de novo* review — a fresh look at the facts — placing a heavy burden of proof on the patient to overturn an HMO's decision.
- ✗ Fails to ensure a binding decision: The decision of a reviewer is binding "only if provisions... were complied with by the independent external reviewer." Allows HMOs to challenge a reviewer's decision in court.

- ✗ Does not provide an appeal when many rights under the bill are denied. For example, when emergency care is denied or access to clinical trials is denied, no appeal is allowed. The only situations in which an appeal is allowed are: when the plan has made the decision to deny care based on medical necessity (which the plan defines itself); and when the plan has defined a treatment as experimental and, on that basis, denied the treatment. The plan itself determines the basis for a denial and thus its eligibility for independent review.
- ✗ Jeopardizes protections for millions of Americans in states that have stronger external review laws.

Ability to Hold HMOs Accountable

Bipartisan Norwood-Dingell Bill

- ✓ Waives ERISA preemption of state remedies when the actions of an HMO have killed or injured a patient. Employers may not be sued unless they, rather than the insurance company or HMO, made the decision to deny care that led to the injury or death.

Senate Republican Bill

- ✗ Maintains existing federal law protections for HMOs and insurers that injure or kill patients when they delay or deny care. Current federal law (ERISA) preempts State remedies. The only remedy under ERISA is recovery of the cost of the denied benefit. For example, if a patient is denied a mammogram and dies of breast cancer as a result, the only remedy available to the family is the recovery of the cost of the mammogram.

Protection of the Doctor-Patient Relationship

Bipartisan Dingell-Norwood Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Prohibits plans from interfering with doctor-patient communications in any way.
- ✓ Limits HMOs' financial incentive arrangements that penalize doctors for providing quality care (incorporates Medicare rules).
- ✓ Prohibits plans from punishing health professionals who advocate for patients in appeal process or report quality problems.

Senate Republican Bill

- ✗ Applies only to those in self-insured plans (48 million).
- ✗ Prohibits plans from forbidding doctors to discuss treatment options with patients.
- ✗ Does not ensure that doctors can talk about the HMO's financial incentives or its processes for determining whether it will approve care.
- ✗ Does not include additional measures needed to make a prohibition on gag clauses meaningful, since HMOs can continue to:
 - 1) establish financial incentives that penalize a doctor for prescribing expensive care or making referrals to needed specialists; and
 - 2) penalize doctors and other health professionals who advocate for patients in the appeals process or report quality problems.

Information for Consumers

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Requires consumer information up front on specific benefit exclusions, and requires timely notification when benefits change.

Senate Republican Bill

- ✗ Excludes 38 million people with individual insurance policies or coverage from a state or local government plan.
- ✗ Does not require plans to tell patients when their benefits change.
- ✗ Does not require plans to tell patients up front the specific benefits excluded from coverage.

External Appeals

Bipartisan Norwood-Dingell Bill

- ✓ Covers all privately insured Americans (161 million).
- ✓ Ensures that a state or federal agency controls the process for choosing the appeal entity — not the insurer.
- ✓ Ensures a reviewer's decision is based on a review of the best available medical evidence and patient's condition, not on the plan's definition of medical necessity.
- ✓ Ensures that the decision of the independent reviewer is binding.
- ✓ Permits all denials of care or payment for care that involve any element of medical judgment to be appealed to an external reviewer.

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- ✗ Leaves out 38 million Americans: those in the individual market and those receiving coverage from State and local governments.
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